Supreme Court, U.S.
FILED

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No. ____

In The

# Supreme Court of the United States

Evans Koukios, d/b/a Scientific Information Systems

**Petitioner**

**v.**

Michael Ganson, L.P.A./Mr. Michael Ganson; Graydon, Head and Ritchey/Mr. Harry J. Finke; Cincinnati Bar Association /Mr. Edwin W. Patterson III; Supreme Court of Ohio, Office of Disciplinary Counsel/Ms. Sally Ann Steuk.

**Respondents**

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

**Evans Koukios**
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**513 559 0641**

62 pp

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, impose a federal duty on states to regulate the conduct of their attorney bars to a standard, definable by the United States Supreme Court, and enforceable by United States District Courts?**

**Does a pro se litigant state a Fourteenth Amendment or 42 U.S.C. § 1983 claim against private and state parties when alleging a pattern of misuse of state court processes with constitutional infirmities and where the state attorney disciplinary rules are being violated with the acquiescence and collusion of the state authorities acting in a secretive disciplinary environment closed to the public?**

**Should pro se litigants be afforded less stringent treatment with respect to the Federal Rules of Civil Procedure that is comparable to the less stringent pleading requirements of pro se Plaintiffs?**

## PARTIES TO THE PROCEEDING

**Petitioner**

Evans Koukios, d/b/a Scientific Information Systems

**Respondents**

Michael Ganson, L.P.A./Mr. Michael Ganson; Graydon, Head and Ritchey/Mr. Harry J. Finke; Cincinnati Bar Association /Mr. Edwin W. Patterson III; Supreme Court of Ohio, Office of Disciplinary Counsel/Ms. Sally Ann Steuk.

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A post trial Fed. R. Civ. P. 59/60 Order of the District Court, entered August 24, 1999, is printed in Appendix C.

The opinion of the United States Court of Appeals for the Sixth Circuit, entered August 11, 2000, is unreported and a copy is included in the Appendix at Appendix A.

## JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on August 11, 2000. Petitioners timely filed Petition for Rehearing *En Banc* was denied on October 12, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and § 2106.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Constitution, Article VI, Sec. 2 and 3:**

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution....

**U.S. Constitution, First, Fourth, Fourteenth Amendments**

**42 U.S.C. § 1983**

**18 U.S.C.A §1503**

**Pertinent Sections of the State of Ohio's Attorney Disciplinary Code and Rules of Governance of the Bar**

**Ohio Rule of Civil Procedure 41(a)**

## STATEMENT OF CASE

Petitioner, Koukios, filed a complaint in the United States District Court on October 10, 1996 against four defendants involved with the judicial system of the State of Ohio. Defendant Ganson is an attorney who represented an opposing party to Koukios in state court litigation initiated by Koukios. Defendant Graydon, Head and Ritchey (GHR) is the fifth largest law firm in Cincinnati, Ohio and Mr. Finke was co-counsel for Koukios in the state court litigation. Defendant Cincinnati Bar Association (CBA) is a non-profit professional association of more than 7000 members centered in Hamilton County Ohio. It has an office and a certified attorney grievance committee for taking complaints from residents in the area about unethical conduct of attorneys. Defendant Office of Disciplinary Counsel is connected to the Supreme Court of Ohio and has its office in Columbus, where it processes disciplinary complaints filed in its office.

## FACTUAL BACKGROUND

Koukios was the sole proprietor of a computer software business and had Marketing Dynamics, Inc. (MDI) as a client from 1980 to 1990. Pursuant to a contract in 1990, Koukios installed a new computer and software system. The relationship abruptly ended and MDI had a balance of $42,860 on its account. Having never previously utilized legal services, Koukios investigated hiring an attorney and in 1991 retained Mr. Friedmann. Mr. Friedmann filed suit in the Hamilton County Court of Common Pleas.

From the time of his first engagement with the legal system in 1991, however, Koukios began to notice that the conduct of attorneys he met was unethical. Koukios' observations of Ganson began when he filed a counterclaim including a punitive count for $90,000. Such a claim could only engender ill will.

Koukios noted Mr. Ganson withheld discovery, claimed a competitor now servicing Koukios' software was hired in anticipation of litigation, opposed amendment of Koukios complaint by Defendant Finke to protect Koukios' trade secrets, and noted Ganson began using "extortion" and "fraud" with respect to Koukios in letters and court filings.

Koukios became concerned and asked his co-counsel, Defendant Finke, to inform Ganson of his professional responsibilities. Mr. Finke advised that Ganson's remarks were not actionable and did nothing. Koukios then witnessed Mr. Ganson serve by county sheriff defamatory trial subpoenas on all of Koukios' other clients. Distraught, Koukios contacted the CBA to file a grievance, but was told by the telephone receptionist that the CBA would not take a grievance from an opposing litigant.

Koukios was advised by his attorneys that his complaint could be voluntarily dismissed and Koukios then witnessed Mr. Ganson proceed to trial on his counterclaim, after agreeing on the record that his counterclaim could be independently adjudicated. Then Koukios witnessed Mr. Ganson appear in the refilled action to argue that the claim dismissed was compulsory to the counterclaim.

At the trial on the counterclaim, Koukios witnessed Mr. Ganson's expert contradict his deposition testimony, and after a ten-day trial witnessed Mr. Ganson illegally garnish $9,000 from Koukios' business account on a false affidavit that included $3,400 in un-awarded deposition costs. Koukios witnessed Mr. Ganson purloin from the court reporter a fee in excess of $2,000 by having two high school youth impermissibly copy the transcript of the trial so that he could prepare MDI's brief.

Finally Koukios witnessed appellate judge Bettman upset at oral argument because Ganson had included in his brief a trial court opinion overturned by the Ohio Supreme Court. Koukios, disturbed by an intent to falsely persuade a tribunal, filed a grievance with the CBA despite its policy. The CBA's bar counsel, Defendant Mr. Patterson, responded by letter saying that the CBA could not take the grievance because of its policy regarding opposing litigants.

Koukios became aware of the ODC and filed a complaint and discovered that it had no policy against taking complaints from opposing litigants. Defendant Sally Ann Steuk investigated the complaint and informed Koukios by letter that since no judge had found problems with Mr. Ganson's conduct, the grievance would be dismissed. But Koukios' attorneys never petitioned the court for any sanctions.

Mr. Ganson judgment on the counterclaim was modified on appeal for being against the manifest weight of the evidence and the 1992 garnishment became more excessive, more than $6000 returned to Koukios but a balance remained on deposit with the

court. On further appeal, the panel noted that the garnishment was wrongful in nature, and only then did Mr. Friedmann file a motion for sanctions against Mr. Ganson. The trial court, however, refused to provide a hearing and the appellate court affirmed. As the state court would not provide a hearing and the ODC and Ms. Steuk's policy for determining misconduct depended on a hearing, the unpublished and confidential custom of the state was that it was impossible to discipline Mr. Ganson.

Mr. Ganson made a private threat to retaliate against Koukios and Koukios communicated this information to the CBA. Bar Counsel and Defendant Patterson acknowledged receipt of Koukios' letter, but took no action. In September 1996, Ganson had the $2,000 remaining on deposit with the Clerk released to him and deposited the check into his IOLTA account.

Koukios filed suit in the federal district court on October 10, 1996. During the federal court action, Mr. Ganson started a new garnishment. Koukios filed a supplemental complaint asking for an order to the Supreme Court of Ohio to show cause why Ganson should not be disqualified from the state court proceedings as there was evidence that Mr. Ganson was proceeding without a client as MDI had been foreclosed upon and had no statutory agent. The ODC opposed Koukios' supplemental pleading stating that Koukios was not entitled to an appeal of his grievance.

Mr. Ganson then started contempt proceedings to have Mr. Koukios appear at a judgment debtor's exam and Koukios filed a second supplemental complaint asking for an order against Ganson to cease

and desist from violating the attorney disciplinary code and from taking actions that would harass or injure. This supplement was again opposed and Koukios was incarcerated by Hamilton County sheriffs to compel his appearance before Mr. Ganson. It was only then that the Hamilton County court discovered that Mr. Ganson could not conduct the exam for which Koukios was incarcerated, because Mr. Ganson indeed had no client.

Koukios would not file another disciplinary grievance with the CBA or the ODC. Being retaliated against for being a witness of attorney misconduct has a chilling effect.

## PROCEDURAL POSTURE

Petitioner's claim consists of an original complaint filed on October 10, 1996, three supplemental complaints alleging new facts that occurred after the filing of the original complaint, and Plaintiff's First Amended Complaint that incorporated the previous filings. From the time period of October 10, 1996 on, Koukios was under the protection of federal law by being a party in a suit in the federal district court.

The claim presented was not frivolous. The court recognized a pendant state claim for attorney malpractice against Defendant GHR and litigated a motion for summary judgment on statute of limitations in favor of the Plaintiff. Defendant Ganson was ORDERED by the Magistrate Judge to answer the first supplemental complaint, but he failed to do so, instead filing a motion to dismiss. The Magistrate issued three reports recommending dismissal but the District Court on review remanded for additional reports. In the

intervening period, Plaintiff filed his Third Supplemental Complaint, First Amended Complaint "as of right", and served discovery on the Defendant Parties. The Magistrate granted each Defendant a protective order, and denied as moot Plaintiff's motion to compel against Defendant Ganson.

The allegations in Koukios' federal complaint about Defendant Ganson were classified by the District Court and the Sixth Circuit Court of Appeals as only facts relating to the misuse of state judicial process. Such acts are private and not cognizable under the Fourteenth Amendment or U.S.C. Section § 1983.

If, however, a private actor employs the state, state actors, or state created process to deprive a United States citizen of a federal right or immunity, so that the conduct can be fairly attributed to the state, the otherwise private conduct becomes that of the state and cognizable under the federal constitution and law. Moreover, if private conduct violates federal law, it is immediately cognizable under the original jurisdiction of the federal district court.

## FIRST QUESTION AND ARGUMENT FOR GRANTING WRIT

**Does the supremacy clause of the United States Constitution, Article VI, Sec. 2 and 3, impose a federal duty on states to regulate the conduct of their attorney bars to a standard, definable by the United States Supreme Court, and enforceable by United States District Courts?**

U.S. Constitution, Article VI, Sec. 2 and 3 reads in part:

> This Constitution, and the Law of the United States which shall be made in Pursuance thereof; ...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . .

Though the Fourteenth Amendment and 42 U.S.C. § 1983 refer to limits of state conduct, this section of the Constitution places an additional duty on states to bind "all executive and judicial Officers" to support the Constitution of the United States. Moreover, the clause itself places the supreme law of the land in federal law, overriding any law states may make to regulate the affairs of their citizens. It applies to the decision-making and conduct of executive and judicial officers such that it is regulated within the bounds of the United States Constitution. The issue becomes, what is the obligation imposed on states to bind executive and judicial officers.

An examination of pro se Plaintiff's First Amended Complaint finds the essence of Art. VI where Plaintiff alleged:

> 2. The establishment and enforcement of a Code of Professional Responsibility for officers

> of state courts stems from the United States Constitution. Such systems exist for the benefit of the people and no reason but serving the public good justifies their maintenance.

The complaint then alleges that grievances are being dismissed without adequate process in Ohio, that the duty to investigate grievances was mandatory but was not performed by the CBA and ODC on the acts coming to their attention through Plaintiff's complaint, that the ODC was now, in addition to the CBA earlier, asking for sanctions against Plaintiff which were unconstitutional, and that 99.33% of all grievances filed by Ohio citizens were being dismissed, having resulted in more than 30,000 dismissed complaints since Koukios first entered the judicial system. Moreover, the complaint alleges, that this judicial activity is closed to the public and it seeks relief in modifications of the disciplinary system such that the "people" come first.

There is no doubt the complaint is alleging and asking for the supremacy of the United States Constitution in matters regulating the bar, as the injury to Koukios and other Ohio citizens is an injury to them as United States citizens. It alleges an independent right exists to be protected by the supremacy clause.

Petitioner argues, therefore, that jurisdiction was proper in the District Court under its original jurisdiction over the Defendants in this action. What makes this case atypical is that the question presented is from a witness in the disciplinary system, not an attorney who has been disciplined. Plaintiff is seeking relief from the injuries that befall citizens who are the witnesses of judicial misconduct that is not regulated

pursuant to the U.S. Constitution. It is also necessary, and therefore a part of the Constitution, that integrity ("oath") give effect to and bind the Constitution to the people. The degree of integrity required is the issue.

The Supreme Court should note that the Professional Codes of Responsibility have within them provisions known as the "Himmel Rule" that place a duty on judges and attorneys who have witnessed misconduct to report to the appropriate tribunal or grievance committee. These rules require judicial officers to be witnesses and bind them to the Constitution. The Himmel rule was expanded upon in Iowa in *Iowa Supreme Court Board of Professional Conduct & Ethics v. Marcia A. Miller*, 568 N.W.2d 665 (Iowa, Sept. 17, 1997) when that court ruled the Iowa version of the Himmel rule additionally implies a duty on attorneys not to frustrate the disciplinary process, and any attempt to so interfere with that process is another basis for discipline. This holding is in conflict with the conduct alleged in the record below.

The CBA immediately asked in its motion to dismiss to recover from Plaintiff all of the CBA's attorneys fees for having to bring its immunity defense. It claimed Koukios had no standing to bring suit to compel it to investigate any grievance. The Hawaii Supreme Court took the same position on standing, stating that the only function of a complaining witness is to supply evidence of the alleged misconduct, the witness having no additional rights whatsoever. *Akinaka vs. Disciplinary Board of the Hawai'i Supreme Court, et.al.*, S.Ct. No. 21776 (June 30, 1999). With no rights, however, a witness has no purpose for filing a grievance and at the same time risks threat and

retaliation. It is not objectively reasonable to expect witnesses to complain if they cannot expect, and do not have a right to expect, integrity of the process and a just outcome of the grievance proceeding. Akinaka had that expectation when he filed his grievance. Koukios had a similar expectation when he filed his grievance.

With no presumed rights as a complaining witness in the District Court, Defendant Ganson initiated contempt proceedings in the state court against Koukios and had him incarcerated. The contempt action was, however, unwarranted and only after injuring Koukios did Mr. Ganson stop, for the real purpose for instigating the contempt action was interference with the disciplinary process and the federal proceeding. It should have been clear to the District Court and the defendant state actors that initiation of a state court contempt proceeding cannot and should not be used to interfere with the determination of a federal question.

The District Court should have filed a grievance with the Supreme Court of Ohio and taken up the matter under its own disciplinary rules. It could have intervened, for when a state bar acts in bad faith or to retaliate against First Amendment protected activity, the courts should not abstain. *Hensler v. District Four Grievance Committee* 790 F.2d 390, 391 (5th Cir. 1986). The filing of a grievance against an attorney is no less a petition to the judicial branch of government than any other expression of speech. It is a complaint against injustice in the judicial institution. This court succinctly wrote: ". . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First

Amendment rights." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297.

Federal courts have taken cognizance of state rules of attorney ethics as cited in *Grievance Committee for the Southern District of New York v. Robert M. Simels*, United States Court of Appeals for the Second Circuit, No. 1679—August Term 1993, Docket No. 94-6003, where DR 7-104(A)(1) was interpreted for federal purposes in criminal contexts. The U.S. Supreme Court has also determined many cases on the rules of governance of state bars and constitutional issues related to sanctions imposed on attorneys.

This Petition asks the Supreme Court to decide the rights of complaining witnesses in the scheme of attorney discipline, for there must be a constitutional right of witnesses to expect integrity in both the process and its outcome. The process cannot be cloaked in secrecy like in Ohio as a probable cause determination informs the public of the criteria for bringing grievances. Such determinations should be reported. The outcome, moreover, cannot violate a citizen's basic sense of ethics, fairness and integrity. If conduct, including litigation practice, as measured against a disciplinary rule violates the rule, a sanction commensurate with the rule violation should be applied. Finally, the balance of outcome between the interests of the bar and the public must weigh in favor of the public, for the constitutional right of the supremacy clause does not belong to the attorney bar. It belongs to the citizens for protecting their fundamental rights under the United States Constitution.

A speech of United States Supreme Court Justice Sandra Day O' Conner to the American Bar Association was reported in the Cincinnati Enquirer in December 1993 and petitioner had a chance to read it at that time. The article stated:

> She cited others who predict the practice of law in the 1990s 'will be nasty, brutish and, for some, short' and said such an atmosphere is bound to drive from the legal profession many of its best people. Too many lawyers approach the law as if they were in battle or at war, O' Connor said, adding that a common objection to civility is (that) it will in some way disserve the client. Civility is hard to codify or legislate 'without a fundamental change in attorneys' conscience'.

The change spoken of by the Justice in the conscience of attorneys is in the proper resolution of this case. The conscience of the courts is the Code of Professional Responsibility. No other authority but the United States Supreme Court remains for guidance on this fundamental constitutional question.

When a state shows a statistic of 100% of grievances filed resulting in appropriate and deterring sanction, the attorney grievance system could be said to be working optimally. When the number of grievances filed becomes zero, judicial officers will be bound to the full measure envisioned by the framers of the constitution.

## SECOND QUESTION AND ARGUMENT FOR GRANTING WRIT

**Does a pro se litigant state a Fourteenth Amendment or 42 U.S.C. § 1983 claim against private and state parties when alleging a pattern of misuse of state court processes with constitutional infirmities and where the state attorney disciplinary rules are being violated with the acquiescence and collusion of the state authorities acting in a secretive disciplinary environment closed to the public?**

The complaint dismissed by the District Court should not have been dismissed because it is not a complaint solely about private conduct. The United States Supreme Court should grant certiorari to redirect the tendency of lower courts to summarily view fact patterns connected to previous or ongoing state court proceedings, especially by pro se plaintiffs, as necessarily being private and merely brought by disaffected litigants.

Inquiry is short-circuited into the state action facts. The opinions of the District Court and the Sixth Circuit Court of Appeals reveal this problem. They do not contain an analysis of Supreme Court cases like *Dennis v. Sparks*, 449 U.S. 24 (1980) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) that most resemble the fact pattern of the instant record.

First, this record alleges a deprivation of access to the courts. The state scheme employed required use of Ohio Rule 13 making counterclaims compulsory 28 days after being served with suit but lacking a notice requirement in the event of a voluntary dismissal of the

claim, Rule 41 vaguely worded that permit voluntary dismissals if counterclaims could be independently adjudicated, and Rule 12 which did not permit the bringing of a res judicata defense because it lacked a notice and hearing requirement necessary for determining such a defense but which was permitted by custom nevertheless in the state court for evaluation of this defense. The federal courts would not decide the constitutionality of the rules nor give cognizance to the scheme employing these infirm state rules. As in *Lugar* the Supreme Court should reverse and extend its range to cover schemes denying citizens access to courts by the wrongful use of a res judicata defense.

The injury further implicates the state because the false application is mistakenly justified as a necessary measure to control court dockets. Success in using the scheme is exemplary against the party injured. In *BMW of North America, Inc. v. Ira Gore, Jr.* 116 S.Ct. 1589, (1996), the Supreme Court emphasized that states must not violate the "the basic guarantee of non-arbitrary governmental behavior that the Due Process Clause provides". It also stated:

> Elemental notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant

should reflect "the enormity of his offense." *Day v. Woodworth*, 13 How. 363, 317, 14 L.Ed. 181 (1852).

There was no reprehensibility or enormity in the conduct of Koukios, the injured party. The private actor, Defendant Ganson, lacking integrity and taking advantage of the scheme permitted by infirm rules, created reprehensibility where none existed.

Moreover, the scheme is repulsive because it begets litigation to undue the injustice. Defendant GHR, now sued for attorney malpractice that is unresolved eight years later, did not right the injury. Therefore, Defendant GHR and the other state actors should not be excused for contributing to the constitutional violation.

Second, Plaintiff's claim contained facts of a wrongful garnishment. Besides being filed on a false affidavit, its main due process flaw was that it was instigated as part of the unconstitutional scheme described above, rendering the judgment claimed to be collecting as unenforceable. The agreement based on the state's Rule 41(a) permitting the counterclaimant to proceed independently to trial was constitutional in nature as it equally permitted the independent pursuit of any re-filed action containing the original claims. Once Defendant Ganson filed his motion to dismiss to block the independent pursuit of Koukios' constitutional right, he and the State had no right to enforce the constitutional consideration the State had given to Defendant Ganson. No other holding could be permitted under the United States Constitution.

Plaintiff's complaint asked for a ruling on this constitutional agreement and the District Court should have found that the State's judgment was unenforceable, rendering the seizure unconstitutional. It has all of the characteristics of a pre-judgment seizure and none of the protections such seizures require. It fits the fact pattern of *Lugar* which should have been used as controlling law.

Third, after Koukios filed suit in federal court on October 10, 1996, all of the parties, including the two state actors, were under the jurisdiction of the federal District Court. The claim alleged collusion amongst members of the bar and the failure of all of the legal entities, including the state actors responsible for disciplining Mr. Ganson, to perform their duties under Ohio's law. The original complaint stated:

> 70. When members of the bar collude to protect themselves from liability and to obstruct justice to deny those seeking redress against unethical, prejudicial and unlawful conduct of attorneys before the court, all litigants with constitutional rights are harmed, as is the honor and integrity of the court.
>
> 72. Graydon Head and Ritchey was contractually bound to Scientific Information Systems by the Code of Professional Responsibility to zealously represent Mr. Koukios but it refused to provide representation to regulate the conduct of the opposing attorney within the bounds of the law. Instead, it acted in silent collusion with other members of its profession, including Mr.

Ganson and Mr. Prince, to cause harm to Mr. Koukios. The conduct of Graydon Head and Ritchey to resist taking action against Mr. Ganson was both negligent and intentional.

82. The policy of the Cincinnati Bar to refuse to investigate complaints against its members is a fraudulent representation, which condones wrongful and unprofessional conduct in court proceedings to the detriment of litigants. In addition, its members collude to avoid actions against each other to regulate their conduct to a true standard of the Code of Professional Responsibility. The bad faith conduct of Mr. Ganson, which continues today to taint proceedings and to deny Mr. Koukios his civil rights, is occurring because the Supreme Court of Ohio is not properly discharging it duties.

84. This plaintiff has been damaged by having its business interfered with and interrupted by Mr. Ganson who is a member of the Cincinnati Bar Association and who is under the Bar's direct supervision and control in matters of attorney conduct. Moreover, the Bar acted to mislead Mr. Koukios about the regulation it could provide and the standard of conduct its attorneys would measure up to, which is the Code of Professional Responsibility.

The first supplemental complaint stated:

129. The duty to discipline its Bar rests with the Supreme Court of Ohio.

WHEREFORE plaintiff prays for injunctive and other relief as follows:

130. To order the Supreme Court of Ohio, Office of Disciplinary Counsel, to show cause as to why Mr. Ganson should not be disciplined and disqualified as counsel for Marketing Dynamics, Inc. in A91-08767 so as to immediately stop the continuing violation of Mr. Koukios' constitutional rights.

In the third supplemental complaint Plaintiff stated:

168. Magistrate Timothy Hogan was a Hamilton County Common Pleas Court Judge in the years 1995 and 1996, sitting on the same bench as Judges Tracey and Crush. The U.S. District Court did not act to stop the unconstitutional state processes directed by Mr. Ganson or to order Mr. Ganson to obey the Disciplinary Code.

169. Mr. Ganson was ordered by the U.S. District Court to answer the first supplemental complaint. Mr. Ganson failed to answer the complaint, has not denied any of its allegations, and by the rules of this court has presumably admitted these allegations.

170. On October 15, 1997, Mr. Ganson obtained an order from Judge Crush through Magistrate Bernat to deliver the body of Evans Koukios to the Hamilton County Court of

Common Pleas to permit Mr. Ganson to conduct a judgment debtor exam. The language of the order was for Mr. Koukios to "show cause why he should not be PUNISHED FOR CONTEMPT" [emphasis provided].

171. The order was obtained by false affirmations of Mr. Ganson, Mr. Ganson did not have probable cause for initiating the warrant, he was in violation of DR-2-110 (B), and the proceedings to be conducted would further violate Mr. Koukios' constitutional rights. The due administration of justice required the disqualification of Mr. Ganson from the proceedings.

172. Obstruction of justice includes concealing from authorized tribunals information germane to its functioning. The obstructing justice statute is designed to protect witnesses in federal courts, and also to prevent miscarriage of justice by corrupt methods. "Whoever corruptly *** obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined *** or imprisoned ****". 18 U.S.C.A §1503. *Ethridge v. United States,* 258 F.2d 234 (9th Cir. 1958). *United States of America v. Samuel I.Cohen,* 202 F.Supp. 587, 1962.

The District Court had to find from these allegations whether Ganson and GHR were jointly engaged with state officials in the challenged actions. *Dennis v. Sparks,* 449 U.S. 24 (1980) dealt with the alleged corruption of a state court judge, the judge as a

state employee immediately giving rise to state action. His judicial immunity from damages liability did not change the character of his actions or that of the private parties. Nor did judicial immunity excuse the judge from responding to discovery as a witness when his co-conspirators were sued, even though a charge of conspiracy and judicial corruption would be aired and decided. *Gravel v. United States,* 408 U.S. 606 , distinguished.

The Supreme Court must consider why the state actors CBA and ODC permitted the infliction of injury to Koukios, a member of the public, by permitting him to be falsely incarcerated by Defendant Ganson. The conduct permitted was subversion of the judicial process.

During the very limited discovery that was permitted in a concurrent state court action filed by Koukios, evidence revealed that CBA Bar Counsel Patterson secretly communicated with Defendant GHR after Koukios filed his grievance with the CBA. GHR has refused to reveal the subject of the communication and the CBA will provide no discovery. It appears, however, that Patterson acted outside of the authority of his position in a manner to limit the liability of GHR and members of the bar. This is evidence of collusion.

Moreover, all of the Defendants in the District Court proceedings knew that Koukios had an erroneous understanding of when discovery could begin in the federal action and Koukios was waiting for the Magistrate Judge to schedule a case management conference that was never scheduled by the Magistrate or District Court judges. There is a disciplinary rule

requiring an attorney, with knowledge of a case adverse to his position, to present the case if opposing counsel has not presented it. No party or adverse attorney, however, revealed to Koukios their adverse knowledge of the local rule that permitted discovery to begin immediately on filing the complaint. Koukios stated his erroneous belief in his First Supplemental Complaint:

> 112. Mr. Ganson's motion seeks an order for discovery that is pertinent to the instant case. Discovery has not yet been permitted in this proceeding. Thus the motion bearing Defendant Ganson's signature is contrary to the rules of the proceeding in the United States District Court.

All four Defendants thus silently colluded to subvert the rules of the federal district court, just as alleged in the initial complaint, and none were above perpetrating a fraud on Koukios who held, to his detriment and their benefit, his erroneous belief.

Even more troubling was the fact that the fraud was perpetrated on the pro se Plaintiff by the Attorney General of the State of Ohio representing the ODC. The Attorney General is both an attorney and member of Ohio's bar and is, moreover, a state actor by position. The Attorney General should not have assisted Defendant Ganson in the incarceration of Plaintiff Koukios.

No party in the action, therefore, was above corruption and the claim should not have been dismissed by the District Court. The facts of this case

support a theory of official corruption, making *Dennis v. Sparks*, 449 U.S. 24 (1980) more similar to the facts of the instant case than the cases utilized by the District and Circuit courts.

## THIRD QUESTION AND ARGUMENT FOR GRANTING WRIT

**Should pro se litigants be afforded less stringent treatment with respect to the Federal Rules of Civil Procedure that is comparable to the less stringent pleading requirements of pro se Plaintiffs?**

Federal courts have established less stringent pleading requirements for pro se plaintiffs. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993). Pro se complaints are held to less stringent pleading requirements; technical rigor in the examination of such pleadings is inappropriate. *See Snyder v. Internal Revenue Service*, 596 F.Supp. 240.

A similar, less stringent standard, has not been established for pro se plaintiffs with regard to the rules and procedures of the federal courts. The right of pro se representation was recognized and customary at the time of the framing of the U.S. Constitution, as described by this court in *Faretta v. California*, 422 U.S. 806 (1975):

> In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35

> of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment [422 U.S. 806, 813] was proposed, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel . . . ." The right is currently codified in 28 U.S.C. 1654....The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." 34 In the heat of these sentiments the Constitution was forged.

The record below shows cause for establishment of less stringent and fairer standards to protect the self-represented in today's environment of advocacy.

First, the Attorney General of the State of Ohio entered an appearance on behalf of the Office of Disciplinary Counsel and in a motion to dismiss raised Eleventh Amendment immunity. The CBA did likewise, citing cases from states around the country as to why the CBA was immune and why Plaintiff lacked standing to bring suit. Neither Defendant filed an answer to Plaintiff's complaint to raise their affirmative defenses as required by the rules.

When pro se Plaintiff filed his First Amended Complaint "as of right" under Fed. R. Civ. P. 15, these defendants opposed the amendment and Plaintiff filed a motion for sanctions under Fed. R. Civ. P. 11. The District Court denied Plaintiff the right to amend, even though a clear reading of Rule 15 and citation to case

law on the meaning of "responsive pleading" and the context of multi-party litigation would clearly have permitted the amendment. It was a right guaranteed by the Federal Court, but denied to the pro se Plaintiff.

Furthermore, 11th Amendment and immunity questions are not so easily solved and are fact and state dependent. With respect to each of these two defendants, no funds from the public treasury are involved. The act complained of with respect to the CBA was a non-judicial act of a telephone receptionist informing potential grievants that they could not file a disciplinary complaint against an opposing attorney, and the policy itself was an internal policy of the CBA. District courts have authority to grant prospective injunctive relief pursuant to *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) when a state official take actions contrary to the Constitution and is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Frances J. v. Wright*, 19 F.3d 337, 342 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), quoting *Ex Parte Young*, 209 U.S. at 160. These considerations were not given the pro se Plaintiff.

The parties never met with the court to discuss any issues in the complaint or record. This includes not having a case management conference, oral argument on any motion, or oral argument for the appeal. It should not be the usual and accepted practice.

Second, Defendant GHR filed an answer to Plaintiff's complaint out of time and without permission of the court. Plaintiff objected. Defendant Ganson filed an Answer and then was ORDERED to

answer Plaintiff's First Supplemental Complaint, to which he never filed an Answer. Both Answers were defective, but when Plaintiff filed his First Amended Complaint "as of right", both parties objected and Plaintiff filed a Rule 11 motion requesting sanctions.. The District Court, however, denied pro se Plaintiff the right to amend his complaint and the Sixth Circuit Court sanctioned this decision.

Is this the "accepted and usual course of judicial proceedings" or was the District Court's decision "so far departed"? The answer is found by the way the District Court treated the out-of-rule submissions by the represented parties—it accepted them, applying a less stringent standard than the rules required, while at the same time requiring of pro se Plaintiff a more stringent standard. This should not be the accepted and usual course of judicial proceedings and the Supreme Court should reverse again, for a fundamental "right" is implicated in this departure.

Third, Plaintiff read Fed. R. Civ. P. 16 and 26 and concluded that a scheduling conference and order would be set by the court within 120 days and discovery could not begin until then. Fed. R. Civ. P. 16 stated:

> The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized

by local rule, by a magistrate judge [emphasis provided].

Rule 26(a) and (f) stated:

> Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f)....Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.

A scheduling order, however, never issued. The Magistrate Judge never set a scheduling conference, pro se Plaintiff kept waiting for the court, and in his replies to the motions to dismiss, informed opposing counsel and the court that resolution of these matters should wait until after discovery began.

When pro se Plaintiff became aware of the local rule regarding the start of discovery, he sent interrogatories to all of the parties. Each attorney, with the exception of Mr. Ganson's who failed to respond, wrote one perfunctory letter or made one perfunctory telephone call to satisfy the extra-judicial effort requirement in the discovery rules and they each filed

motions for protective order. Plaintiff filed one motion to compel against Defendant Ganson. The Magistrate Judge granted all of the protective orders even though no defendant submitted a response to any question propounded, including Defendant Ganson whose position was fatally defective. The District Court judge, though asked under 28 U.S.C. § 636(b)(1)(A) to review both the discovery orders of the Magistrate and the lack of the required scheduling conference, would not do so. Under Plaintiff's Rule 59/60 motion Plaintiff asked again for review but District Court still would still not do so nor would the Sixth Circuit Court of Appeals.

Thus, the Supreme Court must determine whether, in the usual course of judicial proceedings, there is a right of review to all orders of the court, properly objected to, for in this record, that right is not provided. Moreover, the word "shall" in Fed. R. Civ. P. 16 also confers a right to a scheduling conference, but this right, too, was denied. This cannot be accepted practice in the United States District court for it violates due process, in particular for pro se Plaintiffs.

The record also demonstrates discovery abuse that the 1993 amendments to the rules were designed to curtail and defendant counsels, including the Attorney General of the State of Ohio, were violating the intent of the United States Congress by their failure to comply. This was particularly egregious for the ODC for it also had a public records duty to comply. Due process should have required a proper evaluation.

Fourth and finally, the record contains the issue of recusal, a procedure not included in the Federal Rules. This matter was an issue in this case for

multiple reasons. The Magistrate Judge had been associated with the state court during the time period of the facts alleged in the complaint and certain state court judges were mentioned in the complaint. The Magistrate was presiding over another case brought by Plaintiff's lawyer on copyright issues and both opposing attorneys in that suit had filed papers alleging that Koukios was a person who had filed frivolous disciplinary complaints. The Magistrate Judge's name appeared in Plaintiff's Third Supplemental Complaint because of the events that transpired after the filing of the lawsuit. The complaint contained a properly pled RICO claim against Defendant Ganson that is a claim of original jurisdiction of the court. The Magistrate denied supplementation of the complaint within five days after it was filed, abrogating the rules of motion pleading. He had failed to schedule a management conference.

The facts collectively indicated prejudice towards the Plaintiff. But not until later in the proceeding did Plaintiff discover, when reading a case mentioned in a motion, the mechanism for filing a motion for recusal, and even then the Sixth Circuit was critical of the pro se Plaintiff for not having filed the required affidavit according to the United States Code.

Within 30 days of judgment, plaintiff had to file a state court action to preserve the tolling of time for statute of limitations and did so against defendants Ganson, CBA and GHR. He found that all of the judges in the Hamilton County courts were members of the Cincinnati Bar Association (CBA). Two judges recused because of their membership. The six judges of the Hamilton County First District Court of Appeals would

not recuse and the Supreme Court of Ohio ruled these judges could hear the appeal. Who was right?

The only other magistrate in the local district, Magistrate Sherman, recused from the instant case without explanation at the time the scheduling conference should have been held. He had been President of the Cincinnati Bar Association.

To the pro se Plaintiff, bringing suit against legal defendants and one of them being the local bar association, this case presented problems, not because they were asked for, but from the subject matter of the complaint. Recusal was proper because the Plaintiff was a non-attorney, proceeding pro se.

The Supreme Court should take jurisdiction to determine if the standard of due process provided to him was acceptable for his status as an un-represented party.

## CONCLUSION

The framers of the constitution never intended injury to befall those entering the courts they created. Such injury is, however, demonstrated in this record from the mere, honest pursuit of justice in a Federal District Court. This injury compels the granting of this writ.

The accepted and usual practice for a District Court, when faced with defendant Motions to Dismiss under Fed. R. Civ. P. 12(b), is to view all facts and allegations in the complaint as true, make all inferences in favor of the Plaintiff, liberally construe a pro se

Plaintiff's allegations, and come to a conclusion "beyond any doubt" that the pleadings fail to allege a cause of action under the United States Constitution or United States law under the jurisdiction of the District Court.

The fact-finder is not permitted to weigh the facts. The District Court, however, concluded that Defendant Ganson rightfully instigated contempt charges against Koukios in the state court but the complaint never alleged the rightful conduct of Defendant Ganson, far from it, it alleged a RICO violation of federal law. It alleged a constitutional violation under the Fourth and Fourteenth Amendments to the Constitution. It, moreover, alleged a claim under Article VI, Sec. 2 and 3 and the First Amendment to the Constitution.

The District Court, therefore, departed very far from an accepted and usual course of judicial proceedings, for it failed to take jurisdiction of claims of original jurisdiction for United States District Courts, and the United States Court of Appeals for the Sixth Circuit sanctioned this departure.

This record compels the exercise of the Supreme Court's supervisory power.

/s/_____
Evans Koukios
Petitioner Pro Se

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513-559-0641

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 12, 2000]

No. 99-4060

EVANS KOUKIOS )
)
Plaintiff-Appellant, )
v. )
)
MICHAEL GANSON, ET Al., )
)
Defendants-Appellees. )

BEFORE: KEITH, SILER, AND BATCHELDER, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and the decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

## APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 11, 2000]

No. 99-4060
No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON; GRAYDON HEAD & RITCHIE; CINCINNATI BAR ASSOCIATION; SUPREME COURT OF OHIO OFFICE OF DISCIPLINARY COUNSEL, | ) |
| | ) |
| Defendants-Appellees. | ) |

Appeal from the United States District Court for the Southern District of Ohio, Western Division
S. Arthur Spiegel, United States Senior District Judge, Presiding

Before: KEITH, SILER, AND BATHELDER, Circuit Judges

## OPINION

Evans Koukios, an Ohio resident proceeding pro se, appeals a district court order dismissing his civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and declaratory relief, Koukios sued Michael Ganson; Harry J. Finke and Graydon, Head & Ritchey; Edwin Patterson, III, and the Cincinnati Bar Association ("CBA"); and Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel ("ODC"). Koukios alleged that: (1) Ganson engaged in professional misconduct as opposing counsel in a lawsuit Koukios filed in state court; (2) Finke and Graydon, Head & Ritchie, who represented Koukios, failed to respond properly to Ganson's misconduct, and disclosed confidential information to opposing counsel in another state court lawsuit; and (3) the CBA and the ODC failed to act on Koukios's complaints about Ganson. Ganson, Patterson, the CBA, Steuk, and the ODC filed motions to dismiss; Finke and Graydon, Head & Ritchey filed a motion for summary judgment. Koukios tendered proposed second and third supplemental complaints and an amended complaint, adding a claim against Ganson under the RICO Act, 18 U.S.C. § 1961 *et seq.* The magistrate judge recommended granting the motions to dismiss under Fed. R. Civ. P. 12(b)(1) and

(6), dismissing Koukios's claim against Finke and Graydon, Head & Ritchey without prejudice, and denying Koukios's motion for leave to supplement his complaint. In an order dated March 17, 1999, the district court adopted the magistrate judge's report and recommendation over Koukios's objections. The district court also denied Koukios's post-judgment motion.

In his timely appeal, Koukios argues that the district court erred when it dismissed his claims because: (1) the CBA and the ODC were not immune from suit; (2) Koukios has a viable RICO claim against Ganson; and (3) Koukios has a valid supplemental state law claim against Graydon Head & Ritchey.

Initially we note that Koukios does not argue that the district court erred by dismissing his claims against Steuk and Patterson. Issues raised in district court but not on appeal are considered abandoned and not reviewable on appeal. *See Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (order); *Enertech Elec., Inc. v. Mahoning County Comm'rs*, 85 F.3d 257, 259 (6th Cir. 1996). Moreover, Koukios did not request any relief against these individual defendants either in his original complaint or his tendered amended complaint.

Upon de novo review, we conclude that the district court properly dismissed Koukios's claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, *see Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 544 (6th Cir. 1991); *Duncan v. Rolm Mil-Spec Computers*, 917 F.2d 261, 263 (6th Cir. 1990), and under Rule 12(b)(6) for failure to state a claim. *See Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998); *Sistrunk v. City of*

*Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). Koukios failed to state a 42 U.S.C. § 1983 claim against Ganson because a lawyer representing a client is not, by virtue of being an officer of the court, a state actor under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

Koukios's argument that the district court should not have dismissed his action against Ganson because he had a viable RICO claim is without merit. Koukios first presented his RICO theory in a motion to supplement his complaint pursuant to Fed. R. Civ.P. 15(d), after the magistrate judge recommended dismissing his complaint. We conclude that the district court did not abuse its discretion when it denied Koukios's motion to supplement because Koukios's supplemental pleading contained a new legal theory, not just events that occurred after the complaint. *See* Fed. R. Civ. P. 15(d); *McHenry v. Ford Motor Co.*, 269 F.2d 18, 25 (6th Cir 1959); *Schuckman v. Rubenstein*, 164 F.2d 952, 958-59 (6th Cir. 1947).

We also conclude that the district court properly dismissed Koukios's claim against the ODC under Fed. R. Civ. P. 12(b)(1) because the ODC enjoys Eleventh Amendment immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 472-73 (1987); *Pennhurst State Sch. & Hosp. V. Halderman*, 465 U.S. 89, 100-01 (1984); *Thiekol Corp. v. Department of Treasury, State of Mich., revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993). Koukios's argument that the Ohio Supreme Court waived its immunity is without merit. The disciplinary rule upon which Koukios relies, Ohio Gov. Bar R. V, § 3(D)(2)(b)(ix), does not expressly waive

immunity, and Koukios cites no authority for his interpretation of the rule. *See Edelman v. Jordan*, 415 U.S. 651,673 (1974).

We also agree with the district court that the CBA is immune from suit, although our reasoning differs slightly from that of the district court. See *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244,251 (6th Cir. 1994). The district court held that the CBA was entitled to judicial immunity. *See Sparks v. Character and Fitness Comm. Of Ky.*, 859 F.2d 428, 434 (6th Cir. 1988). The CBA's immunity is more accurately described as prosecutorial because the act of which Koukios complained concerned the CBA's enforcement of a code of conduct. *See Forrester v. White*, 484 U.S. 219,228-28 (1988); *Supreme Court of Va. V. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736-37 (1980); *Imbler v. Pachtman*, 425 U.S. 409,421-29 (1976); *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 722 (6th Cir. 1993). In any event, the CBA is immune from suit.

Moreover, we agree with the district court that Koukios lacked standing to enforce Ohio's lawyer disciplinary system by suing the ODC or the CBA. *See Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566-67 (10th Cir. 1993). In addition, the ODC's and the CBA's failure to discipline Ganson did not violate any federal right held by Koukios. *See Saier v. State Bar of Mich.*, 293 F.2d 756,761 (6th Cir. 1961); see also *Leeke v. Timmerman*, 454 U.S. 83, 86 (1981).

We conclude that the district court properly dismissed Koukios's claims against Finke and the law firm Graydon, Head & Ritchie without prejudice. The district court properly declined to exercise jurisdiction

over this supplemental state law claim. See 28 U.S.C. § 1367(c)(3); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

Finally, Koukios's argument that the magistrate judge should have recused himself is without merit. First, Koukios failed to file an affidavit as required by 28 U.S.C. § 144. *See United States v. Sammons*, 918 F.2d 592,598-99 (6th Cir. 1990). Second, Koukios presented no evidence that the magistrate judge had any personal bias or prejudice either against Koukios or in favor of any of the defendants. See 28 U.S.C. § 144. Finally, Koukios did not show that the magistrate judge's impartiality could reasonably be questioned. See 28 U.S.C. § 455. Although the magistrate judge was a state court judge when Koukios's state court case was pending, he did not preside over Koukios's case. Accordingly, the magistrate judge did not abuse his discretion when he declined to recuse himself. See Sammons, 918 F.2d at 599.

For the foregoing reasons, we affirm the district court's order. See Rule 34(j)(2)(c), rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green
Clerk

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed August 24, 1999]
[Document 101]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, et al., | ) |
| | ) |
| Defendants | ) |

District Judge S. Arthur Spiegel

ORDER

This matter is before the Court on Plaintiff's Motion for Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 59 and/or 60 for New Trial or Amendment of Order of March 17, 1999 (doc. 91); Memorandum by Defendant Graydon, Head & Ritchey in Opposition to Plaintiff's Motion (doc. 92); Memorandum by Defendant Cincinnati Bar Association in Opposition to Plaintiff' Motion (doc. 93); Memorandum by the Supreme Court of Ohio in

Opposition to Plaintiff's Motion (doc. 94); Memorandum by Defendant Michael Ganson in Opposition to Plaintiff's Motion (doc. 96); Plaintiff's Reply (doc. 97); and Addendums/Supplements to Plaintiff's Motion (docs, 98, 99 & 100).

Pro se Plaintiff Evans Koukios brought this action on October 10, 1996 seeking monetary and declaratory relief under Title 42 U.S.C. § 1983 against Defendants Michael Ganson; Harry J. Finke and Graydon, Head & Ritchey; Edwin Patterson, III, and the Cincinnati Bar Association; and Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel. In an Order dated March 17, 1999 (doc. 89); hereinafter, "March 17th Order"), the Court adopted the Magistrate Judge's reports and recommendations (*docs. 54 & 63) and dismissed Plaintiff's entire action. Specifically, the Court dismissed Plaintiff's federal claims with prejudice pursuant to rule 12(b)(6)[1] of the Federal rules of Civil Procedure and the Court dismissed Plaintiff's state claims without prejudice pursuant to Title 28 U.S.C. § 1367 (c).

Plaintiff now moves this Court for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil or, alternatively, for relief from judgment under rule 60(b). As a preliminary matter, the Court finds that, because

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[1] In response to Plaintiff's request that the Court clarify our dismissal of Plaintiff's federal claims, we note that a court's finding pursuant to Rule 12(b)(6) that a plaintiff cannot receive the relief sought under a federal statute brings the "death knell of the litigation and has the same effect as a dismissal on the merits." Rogers v. Stratton Indus., Inc., 798 F.2d 913, 917 (6th Cir. 1986). Accordingly, dismissals under Rule 12(b)(6) are with prejudice. Id.; see also Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990).

we dismissed Plaintiff's action pursuant to pre-trial motions to dismiss, rule 59(a)[2] cannot provide relief to Plaintiff. We therefore address Plaintiff's motion solely under a Rule 60(b) analysis.

Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or

---

[2] A plaintiff may seek relief under rule 59(a) if the plaintiff is contesting the proceedings or outcome of a jury or bench trial. Rule 59(a) states, in pertinent part that:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.
>
> Fed.R.Civ. P. 59(a) (emphasis added).

> discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . .

Fed. R. Civ. P. 60(b).

To obtain relief under rule 60(b), the moving party must allege circumstances tending to show the applicability of the rule. In re Salem Mortgage Co./Miller v. Owsianowski, 791 F.2d 456, 459 (6th Cir. 1986) (citing Smith v. Kincaid, 249 F.2d 243, 244 (6th Cir. 1957)). The question of whether to grant Rule 60(b) relief rests within the trial court's discretion. Id. In addressing the motion, the court should apply rule 60(b) equitably to achieve substantial justice for the plaintiff and at the same time consider the defendant's and society's interest in the finality of judgments and the avoidance of prejudice. In re Salem Mortgage Co., 791 F.2d at 459-60 (quoting Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980)).

However, a Rule 60(b) motion cannot act as a substitute for an appeal. Schildaus v. Moe, 335 F.2d 529, 531 (2d Dir. 1964). Nor may a plaintiff obtain relief under rule 60(b) "'merely because he is unhappy with the judgment.'" In re Salem Mortgage Co., 791 F.2d at 460 (Wellford, J., dissenting) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2858 at 170 (1973)) (internal citations omitted)).

In the instant matter, Plaintiff appears to seek relief under Rule 60(b)(1), (2), and (3). Each enumerated ground of Rule 60(b) requires a separate analysis. First, motions brought pursuant to Rule 60(b)(1) to assert mistake, inadvertence, or excusable neglect on the part of a litigant must allege more than mere carelessness or ignorance of the law. Id.; see also Weiner v. Sherburne Corp., 57 F.R.D. 636, 638-39 (D. Ver. 1972) (refusing to grant relief under rule 60(b)(1) based on the plaintiff's advancement of a legal argument that could have been presented at an earlier hearing on the defendant's motion to dismiss).

Second, when a moving party submits "newly-discovered evidence" to argue for relief under rule 60(b)(2), the evidence "'must be admissible and credible, and must be of such a material and controlling nature as will probably change the outcome.'" Fertilizer Corp. of India v. IDI Management, Inc., 530 F. Supp. 542, 545 (S.D. Ohio 1982) (quoting 7 Moore's Federal Practice § 60.23(4) at 272-76). Third, to establish fraud under 60(b)(3), the moving party must submit clear and convincing evidence. See Simons v. Gorsuch, 715 F.2d 1248, 1253 (7th Cir. 1983).

Although Plaintiff fails to clearly fit all of his allegations within the enumerated grounds for relief under Rule 60(b), Plaintiff generally argues that he is entitled to relief from judgment because the Court erred in failing to (1) address a claim Plaintiff attempted to bring in a motion to supplement his Complaint; (2) conclude that the dismissal of his action under Fed. R. Civ. P. 12(b)(6) would be against the weight of the evidence; (3) exercise supplemental

jurisdiction; and (4) schedule discovery meetings and review discovery motions.

More specifically, Plaintiff asserts that he should have been informed that discovery could begin upon the filing of his Complaint, and he asserts that the failure to so inform him amounts to misconduct by the ad verse party and entitles him to relief under Rule 60(b)(3). Alternatively, Plaintiff argues that this ignorance of the discovery rules should be considered inadvertence or excusable neglect and thereby earn him relief under Rule 60(b)(1). Plaintiff further asserts that he is entitled to relief under Rule 60(b)(1) because the Court failed to address one of his federal claims. In a supplement to his motion, Plaintiff additionally alleges that his recent study of a 1975 Supreme Court case, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and of Ohio Crim. Code § 2921.52 constitutes "new evidence" entitling him to relief under rule 60(b)(2).

Defendants responded in separate motions to Plaintiff's arguments, each asserting that Plaintiff did not allege any facts or law that would entitle him to relief under Rule 60(b).

After reviewing the record and the evidence submitted therein, this Court finds that Plaintiff's contentions lack merit and we conclude for the following reasons that Plaintiff failed to show the existence of any circumstance that would warrant relief under Rule 60(b).

First, as noted above, Plaintiff's attempt to advance a legal argument based on a 1975 case or Ohio Crim. Code § 2921.52 cannot bring him relief under

Rule 60(b)(1). See In re Salem Mortgage Co., 791 F.2d at 460 (Wellford, J., dissenting) (quoting Federal Practice & Procedure § 2858 at 170); Weiner, 57 F.R.D. at 639. Furthermore, Plaintiff's alleged lack of knowledge about the discovery rules is irrelevant to the legal issues upon which the Court granted Defendants' motions to dismiss and thus cannot merit relief from judgment under Rule 60(b)(2). Even if the Court liberally construes Plaintiff's pro se pleadings, Ratliff v. United States, 999 F.2d 1023, 1026 (6th Cir. 1993), Plaintiff fails to show that the 1975 case is controlling in this matter or that it could prevent the dismissal of his § 1983 claim. Cf. Fertilizer Corp. of India, 530 F. Supp. at 545.

Third, Plaintiff's argument that the alleged failure of Defendants and the Magistrate Judge to tell him that discovery could begin at the filing of his Complaint constitutes "an affirmative misrepresentation" entitling him to relief under Rule 60(b)(3) is wholly unpersuasive. Not only does Plaintiff fail to meet the clear and convincing standard required by courts to merit relief under Rule 60(b)(3), Simons v. Gorsuch, 715 F.2d at 1253, he also does not show why a grant of relief for this reason would achieve substantial justice. Moreover, prior to any discovery in this matter, the Magistrate Judge recommended that Plaintiff's case should be dismissed. Thereafter, the resolution of any discovery disputes would have resulted in a waste of judicial resources.

Plaintiff also alleges that the Court erred in failing to address a federal claim that Plaintiff asserts is found in his First Amended Complaint. Specifically, Plaintiff states that he brought a claim under the Racketeer Influenced and Corrupt Organization Act

("RICO"), Title 18 U.S.C. § 1961 et seq., against Defendant Michael Ganson. After reviewing the record in this case, the Court finds that the RICO claim is alleged only in a proposed amendment to Plaintiff' complaint. This proposed amendment was attached to a motion to supplement the complaint (doc. 37), which both the Magistrate Judge and this Court denied (see docs. 38, 54 & 89). Therefore, contrary to Plaintiff's assertion in his motion for relief from judgment, the merits of the RICO claim never came before this Court.

Nonetheless, Plaintiff insists that the Magistrate Judge and this Court erred in denying his motion to supplement the Complaint. In particular, Plaintiff appears to request that the Court revisit his Motion to Review the Magistrate Judge's Denial of Plaintiff's Motion to Supplement Complaint (doc. 41). In the interest of justice, we once again review the Magistrate Judge's order denying the motion to supplement (doc. 38) as well as Plaintiff's motion to review (doc. 41). Our review of these documents, however, leads us – again – to the conclusion that the Magistrate Judge was correct in denying Plaintiff the ability to supplement his Complaint under Rule 15(d).

Rule 15(d) provides, in pertinent part, that:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Fed. R. Civ. P. 15(d). A motion for leave to file a supplemental pleading is addressed to the discretion of the trial court. Martin v. Associated Truck Lines, Inc., 801 F.2d 246, 248 (6th Cir. 1986); see also Bornholdt v. Brady, 869 F.2d 57, 68 (2d Cir. 1989). As a general rule, plaintiffs are liberally allowed to set forth in supplemental pleadings new facts that constitute the ongoing development of their original causes of action. McHenry v. Ford Motor Co., 269 F.2d 18, 25 (6th Cir. 1959).

However, in the instant action, the Magistrate Judge found that Plaintiff's proposed supplemental complaint failed to allege any new facts that would affect his original Title 42 U.S.C. § 1983 claim (doc. 38). Instead, Plaintiff attempted to allege for the first time in a proposed supplemental complaint that the serving of subpoenas on his clients, his arrest for failing to appear before the state court for a judgment debtor exam, and the garnishment of funds allegedly due as a result of a state court judgment amounted to a civil RICO claim. These facts do not assist Plaintiff in stating a claim under § 1983. Thus, the Magistrate Judge correctly found that, given his recommendation that the case should be dismissed, Plaintiff's motion to supplement was futile (doc. 54). We further note that the introduction of a divergent and complicated federal claim into a case already recommended for dismissal would waste judicial resources and prejudice Defendants. Accordingly, to clarity the record, we hereby DENY Plaintiff' Motion to Review (doc. 41) and AFFIRM the Magistrate Judge" denial of Plaintiff' motion to supplement his Complaint.

Next, in regards to Plaintiff's arguments that the Court's dismissal of his federal § 1983 claims pursuant to Rule 12(b)(6) went against the weight of the evidence and that the Court erred in forgoing supplemental jurisdiction of Plaintiff's state-law claims, we find that these issues are appropriate for an appeal and not for a Rule 60(b) motion. Schildaus, 335 F.2d at 531. Therefore, the Court will not address these issues. The Court also will not consider the ruling by our sister court in Koukios v. Marketing Dynamics, No. 96-980 (S.D. Ohio), mentioned in Plaintiff's Reply because Plaintiff fails to demonstrate how the April 8, 1999 ruling affects the legal issues upon which this Court granted Defendants' motions to dismiss on March 17, 1999.

Finally, in response to Plaintiff's numerous requests that the Court revisit the discovery disputes that arose in this federal action, the Court concludes that any matters related to discovery in this case became moot once the Court granted Defendants' motions to dismiss. We note that Plaintiff submits in support of his motion for relief from judgment copies of responsive pleadings and discovery documents stemming from an entirely separate proceeding currently pending in the Hamilton County Court of Common Pleas. Plaintiff also describes recent conversations between himself and the parties in this case and he asserts that these documents and conversations show that Plaintiff's efforts to amend his Complaint and see discovery in the instant federal case were not futile.

However, the Court finds these documents to be entirely irrelevant to the instant matter. Again, our

dismissal of this action under Rule 12 of the Federal Rules of Civil Procedure mooted any need to address any discovery issues related to Plaintiff's federal case. Furthermore, Plaintiff is reminded of the principle that, "[a]t some point, litigation must come to an end." Consolidated Television Cable Serv., Inc., v. City of Frankfort, 857 F.2d 354, 358 (6th Cir. 1988).

CONCLUSION

Accordingly, Plaintiff's Motion for Relief from Judgment or Order is hereby DENIED.

SO ORDERED.
Dated: August 18, '99
/s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed March 17, 1999]
[Document 89]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff(s) | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, ET Al., | ) |
| | ) |
| Defendant(s) | ) |

District Judge S. Arthur Spiegel

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

...the Court reviewed the complete file de novo, pursuant to 28 USC Sec. 636, and the Court finds the Magistrate Judge's Reports and Recommendations,

dated June 10, 1998 and August 7, 1998, to be correct. For these reasons the Magistrate Judge's reports and Recommendations, the Court DENIES Plaintiff's objections. (2) The Court AFFIRMS and ADOPTS the Reports and Recommendations of the Magistrate Judge and GRANTS the Motion to Dismiss by Defendants Supreme Court of Ohio Office of Disciplinary Counsel and Sally Ann Steuk, the Motion to Dismiss by Defendants Supreme Court of Ohio Office of Disciplinary Counsel and Sally Ann Steuk, the Motion to Dismiss by Defendants Cincinnati Bar Association and Edwin Patterson, III and the Motion to Dismiss by Defendant Michael Ganson. In addition, this Court DISMISSES WITHOUT PREJUIDICE the claims against Defendants Graydon, Head & Ritchey and Harry J. Finke pursuant to 28 USC Sec. 1367(c) and DENIES as MOOT Defendants' Summary Judgment Motion. Finally, Plaintiff's motions to supplement and amend the Complaint are DENIED and Plaintiff's motions for Rule 11 sanctions and the recusal of the Magistrate Judge are DENIED.

March 17, 1999

Kenneth Murphy, Clerk

/s/Vicki Penley
Vicki Penley
Deputy Clerk

## APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed March 17, 1999]
[Document 89]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff, | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, et al., | ) |
| | ) |
| Defendants | ) |

District Judge S. Arthur Spiegel

### ORDER

This matter is before the Court on the Magistrate Judge's June 10, 1998 Report and Recommendation (doc. 54) advising that the Court deny Plaintiff Evans Koukios's motions to supplement and amend his Complaint (docs. 23, 37 & 45), dismiss Plaintiff's claims against Defendants Harry J. Finke and Graydon, Head & Ritchey and deny their motion for summary judgment as moot (doc. 11), and grant the motions to dismiss filed by Defendant Michael Ganson, Defendants Edwin Patterson, III, and the Cincinnati Bar

Association, and Defendants Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel (docs. 3, 4, & 22); Plaintiff's Motion to review the Magistrate Judge's Report and Recommendation (doc. 58); Plaintiff's Motion for Reconsideration (doc. 59); Defendant Cincinnati Bar Association Memorandum in Opposition to Plaintiff's Motion (doc. 60); and Defendant Graydon, Head & Ritchey's Memorandum in Opposition to Plaintiff's Motion (doc. 61).

Also before the Court is the Magistrate Judge's August 7, 1998 Report and Recommendation (doc. 63) denying Plaintiff's motion for sanctions (doc. 53); Plaintiff's Motion to Review the Report and Recommendation and Motion for Recusal (doc. 64); Defendant Michael Ganson's Memorandum in Opposition (doc. 65); Defendant Cincinnati Bar Association's Memorandum in Opposition (doc. 66); and Plaintiff's Reply (doc. 67).

## BACKGROUND

Pro se Plaintiff Evans Koukios brings this action for monetary and declaratory relief under 42 U.S.C. § 1998 against Defendants Michael Ganson; Harry J. Finke and Graydon, Head & Ritchey; Edwin Patterson, III, and the Cincinnati Bar Association; and Sally Ann Steuk and the Supreme Court of Ohio Office of Disciplinary Counsel. This case arises from a dispute involving two lawsuits filed by Plaintiff in the Hamilton County Court of Common Pleas. The dispute primarily involves Plaintiff's allegations of professional misconduct against Defendant Ganson, an attorney who represented one of the defendants in those lawsuits (see docs. 1 & 20). The following facts

are drawn from Plaintiff's filings in the matter (see docs. 1, 20, 23, 37, & 45).

Plaintiff is the sole proprietor of a business known as Scientific Information Systems ("SIS"). On October 8, 1991, Plaintiff filed a complaint in the Hamilton County Court of Common Pleas against Marketing Dynamics, Inc. ("MDI"). Defendant Ganson represented MDI in that action. Plaintiff was represented by attorney Roger E. Friedman; eventually, Graydon, Head & Ritchey and attorney Harry J. Finke entered an appearance as co-counsel in that case on behalf of Plaintiff. Defendant Finke filed a motion for leave to amend the complaint to add claims against another company, Total Access Technologies ("TAT"), but the state court denied the motion.

During the state court case, Defendant Ganson filed a counterclaim on behalf of MDI against Plaintiff and SIS. Then, on October 1, 1992, Plaintiff voluntarily dismissed his complaint against MDI. Thereafter, Judge John Keefe held a bench trial on the counterclaim and entered judgment in favor of MDI. Meanwhile, Plaintiff filed another action against MDI and TAT in the Hamilton County Court of Common Pleas on October 15, 1992, and Plaintiff was again represent by Mr. Friedman and Defendant Finke. Defendant Ganson, on behalf of MDI, filed a motion to dismiss the second state court case based on the doctrine of res judicata. On March 16, 1993, Judge Ann Marie Tracey granted MDI's motion.

In December, 1992, Defendant Ganson initiated state court garnishment proceedings against Plaintiff to satisfy the judgment in favor of MDI in the first state

court case. In 1996, the state court ordered that funds originally deposited by Plaintiff with the Hamilton County Clerk of Courts be released to Defendant Ganson in partial satisfaction of MDI's judgment. In an attempt to recover the balance of the money due MDI, the state court also ordered in 1997 a hearing and a judgment debtor examination. However, Plaintiff failed to appear for both the examination and subsequent contempt of court proceedings. The state court dismissed the contempt and garnishment proceedings related to the counterclaim judgment after Huntington Bank foreclosed on MDI and the Bank signed a waiver of its right to execute the judgment against Plaintiff.

Plaintiff appealed the state court decisions granting judgment in favor of MDI on the counterclaim, permitting the initiation of garnishment proceedings, and approving release of the funds deposited with the Clerk of Courts. He also filed a complaint against Defendant Ganson with the Cincinnati Bar Association ("CBA") and the Supreme Court of Ohio Office of Disciplinary Counsel ("ODC") alleging ethical violations.

Specifically, Plaintiff complained that Defendant Ganson filed an improper motion based on res judicata, improperly and maliciously served subpoenas on Plaintiff's business clients directing them to appear in the state court actions, and improperly garnisheed funds from Plaintiff's business. Plaintiff also asserted that Defendants Finke and Graydon, Head & Ritchey acted with intentional misconduct, or were negligent, in failing to file a disciplinary complaint or to take other action against Defendant Ganson with respect to

his alleged misconduct. Plaintiff also contended that Defendants Finke and Graydon, Head & Ritchey negligenly divulged confidential information about him to an attorney representing TAT.

The ODC and the CBA investigated the charges against Defendant Ganson and concluded that no violation of the Ohio Code of Professional Responsibility had occurred. Thereafter, the ODC and the CBA dismissed Plaintiff's grievances.

In the case now before this Court, Plaintiff claims that Defendants denied him due process of law in violation of the fourteenth Amendment. Plaintiff asserts that the CBA and the ODC violated his due process rights when then failed to impose disciplinary measures against Defendant Ganson for what Plaintiff argues were ethical violation at the state court level. In this Complaint, Plaintiff specifically alleges than CBA failed to properly discharge its duties in assisting the Ohio Supreme Court to regulate the practice of law, that the CBA has a policy of refusing to investigate complaints, and that the CBA refused to take action against Defendant Ganson.

## DISCUSSION

### I. Magistrate Judge's Report and Recommendations (doc. 54).

On June 10, 1998, the Magistrate Judge issued a Report and Recommendation advising this Court to (1) grant the motions to dismiss filed by Defendants Ganson, ODC, and CBA; (2) dismiss without prejudice the claims against Defendants Finke and Graydon,

Head & Ritchey and deny as moot their motion for summary judgment; and (3) deny Plaintiff's motions for leave to supplement and amend the Complaint. For the following reasons, this Court AFFIRMS and ADOPTS the Magistrate Judge's Report and Recommendation.

A. Defendant ODC's Motion to Dismiss

The ODC moved to dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), arguing specifically that Plaintiff lacks standing and that Defendant is cloaked in Eleventh Amendment immunity. When facing a Rules 12(b)(1) motion, a plaintiff must demonstrate that jurisdiction exists over the subject matter to be considered by the federal court. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). On the other hand, a Rule 12(b)(6) motion is only granted against a plaintiff if "it appears beyond doubt than the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In the Report and Recommendation, the Magistrate Judge recommended than ODC's motion be granted under Rule 12(b)(6) because Plaintiff's claims are barred by the Eleventh Amendment. The Eleventh Amendment bars a suit in federal court against a state or one of its agencies, regardless of the type of relief sought, unless the state expressly consents to be sued or Congress unequivocally abrogates the state's immunity. See Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996); Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993);

Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89, 99-100 (1984); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). The Eleventh Amendment also precludes an action against a public agency and its officials if the agency can be characterized as an arm or alter ego of the state. Bremiller v. Cleveland Psychiatric Inst., 879 F. Supp. 782, 786 (N.D. Ohio 1995).

As the Magistrate Judge noted in this case, it is undisputed that both the Ohio Supreme Court and the ODC are arms of the state. Moreover, the State of Ohio has neither waived its immunity nor consented to be sued in federal court. This Court agrees with the Magistrate Judge that the Eleventh Amendment bars Plaintiff's action for damages against Defendant ODC in federal court. The Court also affirms the Magistrate Judge's finding than Plaintiff's claim for declaratory or injunctive relief against ODC is "wholly without merit" and should be dismissed under Rule 12(b)(6) since there is no indication how enjoining a res judicata defense would prevent a violation of Plaintiff's constitutional rights.

The Magistrate Judge further recommended that, to the extent Plaintiff's complaint alleges claims against Defendant Steuk, those claims should be dismissed because claims for damages against Defendant Steuk in her official capacity are barred by the Eleventh Amendment, and because Plaintiff lacks standing to complain about a prosecuting official's failure to bring an official action. Nonetheless, Plaintiff objected to the report and recommendation, contending that he also seeks declaratory and injunctive relief against Defendant Steuk and that his Complaint alleges facts sufficient to state a claim against her.

We find Plaintiff's objections without merit. Even if it were appropriate to bring an action against Defendant Steuk in her official capacity for prospective relief, Plaintiff nevertheless failed to demonstrate how he has standing to require Defendants Steuk, ODC or CBA to pursue disciplinary charges. See Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981) (holding that a private citizen lacks standing to complain about a prosecuting official's failure to bring an official action); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (holding same). Moreover, Plaintiff failed to sufficiently plead a violation of federal constitutional rights, and thus his claims must be dismissed under Fed. R. Civ. P. 12(b)(6). See Saier v. State Bar of Michigan, 293 F.2d 756, 759 (6th Cir. 1961) (finding that the regulation and discipline of lawyers is within the province of an individual state and that the federal constitution does not guarantee a private citizen the right to require state bar associations to investigate lawyers).

B. Defendant CBA's Motion to Dismiss

Defendant CBA moved to dismiss the Complaint pursuant to Fed.R.of Civ.P. 12(b)(1), 12(b)(2), and 12(b)(6) because Plaintiff lacks standing to bring the action against the CBA and because absolute judicial immunity bars Plaintiff's claim against the CBA. Plaintiff objects to the Magistrate Judge's recommendation to dismiss the claims against the CBA, arguing than the CBA is not a governmental agency but rather is a private party.

In his Report and Recommendation, the Magistrate Judge first noted that the Supreme Court of Ohio delegated disciplinary powers to local bar associations pursuant to Ohio S. Ct. Gov. Bar R. V(1)-(3). The claims against Defendant CBA in this case are based on this disciplinary role. The Court agrees with the Magistrate Judge's finding than Plaintiff lacks standing to assert a violation of due process rights based solely on Defendant CBA's decision not to impose disciplinary measures against Defendant Ganson. Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1566 (10th Cir. 1993) (holding that the plaintiff lacked standing to assert a §1983 claim relating to the disposition of a grievance he filed against his ex-wife's attorney). Plaintiff's objection than Defendant CBA is a private party is also without merit. Those who perform judicial acts on behalf of the judiciary are entitled to immunity, and the action of Defendant DBA about which Plaintiff complains is a judicial act to which absolute immunity attaches. See Sparks v. Character & Fitness Comm. Of Kentucky, 859 F.2d 428, 434 (6th Cir. 1988) (holding that the State Supreme Court's action in denying a bar application is a judicial act).

C. Defendant Ganson's Motion to Dismiss

Defendant Ganson moves this Court to dismiss Plaintiff's claims pursuant to Red. R. Civ. P. 12(b)(6). Defendant Ganson argues than Plaintiff cannot maintain a cause of action against him under 42 U.S.C. § 1983 because Defendant Ganson is not a state actor. Defendant Ganson also contends than the Court should deny any motions by Plaintiff to file supplements or amendments to his Complaint because such filings would be futile in light of the pending motions to

dismiss. The Magistrate Judge recommended than Defendant Ganson's motion be granted and then Plaintiff's motions to file supplemental and emend complaints be denied.

Under § 1983, Plaintiff must prove (1) than the challenged conduct was committed by a person acting under the color of state law, and (2) that the conduct "caused" a deprivation of his rights or privileges secured by the laws or Constitution of the United States. Baker v. McCollan, 443 U.S. 137, 140 (1979). Plaintiff contends that Defendant Ganson's conduct denied him due process in violation of the Fourteenth Amendment. Specifically, Plaintiff asserts that he was denied due process when Defendant Ganson filed a motion based on res judicata in the underlying state court proceedings. The Magistrate Judge found that, even if the allegations in Plaintiff's Complaint are sufficient to establish the deprivation of a constitutionally-protected right or privilege, Plaintiff's Complaint against Defendant Ganson should be dismissed because Defendant Ganson did not act under color of state law. This Court agrees with the Magistrate Judge's findings.

Plaintiff's allegations against Defendant Ganson are based on his conduct as an attorney and an officer of the court in the underlying state court proceedings. Defendant Ganson's status as an attorney and an officer of the court, however, does not render his conduct "state action" for purposes of § 1983. Shuttlesworth v. Hous. Opportunities Made Equal, 873 F. Supp. 1069, 1080- (S.D. Ohio 1994); Border City Sav. & Loan Ass'n v. Kennecorp Mortgage & Equities, 523 F. Supp. 190, 193 (S.D. Ohio 1981). Furthermore, Plaintiff fails to

present any factual allegations showing than Defendant Ganson acted under color of state law in his proposed second and third supplemental complaints and proposed amended complaint; thus, it would be a waste of judicial resources to grant Plaintiff's motions to supplement and amend his Complaint. Therefore, this Court hereby GRANTS Defendant Ganson's Motion to Dismiss pursuant to Fed.R.Civ.P.12(b)(6) and DENIES Plaintiff's motions for leave to file supplemental and amended complaints.

D. Defendants Finke and Graydon, Head & Ritchey's Motion for Summary Judgment

The Magistrate Judge determined that the claims against these Defendants involved allegations of malpractice based in state law and recommended that the claims be dismissed for lack of subject matter jurisdiction. We agree with the Magistrate Judge that there is no subject matter jurisdiction over the claims against these Defendants. First, no federal question exists. Secondly, on the face of the Complaint, Plaintiff and Defendants Finke and Graydon, Head & Ritchey are all residents of Ohio. Therefore, complete diversity among all the Parties in this action does not exist.

Because this Court agrees with the Magistrate Judge that Plaintiff's claims against the other Defendants should be dismissed, we hereby DECLINE to exercise supplemental jurisdiction over Plaintiff's claims against Defendants Finke and Graydon, Head & Ritchey. Accordingly, the claims against Defendants Finke and Graydon, Head & Ritchey are DISMISSED WITHOUT PREJUCICE pursuant to 28 U.S.C. § 1367 (c).

## II. Magistrate Judge's Report and Recommendation (doc. 63)

On August 7, 1998, the Magistrate Judge issued a Report and Recommendation (doc. 63) advising the Court to deny Plaintiff's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. Plaintiff thereafter objected to the report and recommendation and moved for this Court to issue an order to recuse the Magistrate Judge from this matter (doc. 64). Defendant Ganson and Defendant CBA filed responses to Plaintiff's motion for recusal (docs. 65 & 66), and Plaintiff filed a Reply (doc. 67).

First, for the following reasons, we hereby AFFIRM and ADOPT the Magistrate Judge's Report and Recommendation advising a denial of Plaintiff's motion for sanctions. Plaintiff moved the Court on June 4, 1998 to impose Rule 11 sanctions against Defendants for the filing of memoranda in opposition to Plaintiff's "First Amended Complaint of Right" (doc 45). Plaintiff argued than the Defendants' memoranda were "objectively frivolous" because "[the fundamental right of leave to amend] is justly entitled" (doc. 53). Plaintiff contended than he is entitled to file an amended complaint "as of right" under Federal Rule of Civil Procedure 15. Therefore, Plaintiff asserted than Defendants are not entitled to oppose his "First Amended Complaint of Right." Furthermore, Plaintiff asserted that Defendants filed the memoranda to harass Plaintiff and delay proceedings.

We agree with the Magistrate Judge than Plaintiff's Motion for Rule 11 Sanctions should be

denied. Plaintiff was not permitted to file an amended complaint "as of right," and there is no evidence that Defendants filed the memoranda to harass Plaintiff or to delay proceedings. Rule 15 provides, in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed.R.Civ.P. 15(a). In this case, Defendant Ganson filed a responsive pleading on December 9, 1996 and Defendant Graydon Head & Ritchey filed a responsive pleading on February 20, 1997. Thus, Plaintiff was no longer entitled to amend his Complaint "as a matter of course" on April 10, 1998. Instead, Rule 15 requires Plaintiff to obtain leave of Court or written consent of the adverse party. Accordingly, Plaintiff's Motion for Rule 11 Sanctions is DENIED.

Secondly, this Court also DENIES Plaintiff's motion for an order directing the recusal of Magistrate Judge Timothy S. Hogan from this matter (doc. 64). Under 28 U.S.C. § 455(a), recusal is required whenever a judge's "impartiality might reasonably be questioned." See also Liteky v. United States, 510 U.S. 540, 555-58 (1994) (finding that opinions formed by a judge on the basis of facts introduced or events occurring during prior or current proceedings do not give rise to a claim of judicial bias unless the opinions

"display a deep-seated favoritism or antagonism than would make fair judgment impossible"; United States v. Sammons, 918 f.2d 592, 599 (6th Cir. 1990) (holding that the trial judge's participation in prior proceedings involving the defendant did not support the defendant's demand for recusal).

Plaintiff alleges judicial bias and points to the facts that Magistrate Judge Hogan once worked in the Hamilton County Court of Common Pleas and that Magistrate Judge Hogan currently presides over two cases in the federal court system in which Mr. Koukios is the plaintiff. We find Plaintiff's motion unpersuasive. Plaintiff failed to present any evidence to establish that the Magistrate Judge holds any personal bias or prejudice against him or in favor of Defendants. Plaintiff also did not show that the Magistrate Judge acquired any knowledge about this case or interest in this case merely by virtue of his past position as a judge in the Hamilton County Court of Common Pleas or because he is allegedly assigned to another federal case in which Plaintiff is involved. Accordingly, Plaintiff's motion for an order directing the recusal of Magistrate Judge Hogan is hereby DENIED.

## CONCLUSION

The Court reviewed the complete file de novo, pursuant to 28 U.S.C. § 636, and we find the Magistrate Judge's Reports and Recommendations, dated June 10, 1998 and August 7, 1998, to be correct. For the reasons stated above and in the Magistrate Judge's Reports and Recommendations, we hereby DENY Plaintiff's objections.

Accordingly, we AFFIRM and ADOPT the Reports and Recommendations of the Magistrate Judge and GRANT the Motion to Dismiss by Defendants Supreme Court of Ohio Office of Disciplinary counsel and Sally Ann Steuk; the Motion to Dismiss by Defendants Cincinnati Bar Association and Edwin Patterson, III; and the Motion to Dismiss by Defendant Michael Ganson. In addition, this Court DISMISSES WITHOUT PREJUDICE the claims against Defendants Graydon, Head & Ritchey and Harry J. Finke pursuant to 28 U.S.C. § 1367(c) and DENIES AS MOOT Defendants' Summary Judgment Motion. Finally, Plaintiff's motion for Rule 11 sanctions and the recusal of the Magistrate Judge are DENIED.

SO ORDERED.

Dated: 3/16/99

/s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

## APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed April 2, 1998]
[Document 44]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff, | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, et al., | ) |
| | ) |
| Defendants. | ) |

District Judge S. Arthur Spiegel

ORDER

This matter is before the Court on the Magistrate Judge's Reports and Recommendations (docs. 25, 26, 33), Plaintiff's objections (doc. 28, 34), Defendant's objection (doc. 27), Defendant Cincinnati Bar Association's Response (doc. 29), Defendant Office of Disciplinary Counsel's Response (doc. 31), Defendant Graydon, Head & Ritchey's Response (doc. 32), and Defendant Ganson's Response (doc. 35).

The Court has reviewed the three Reports and Recommendation in this case. The Court is unable to comprehensively rule on the objections to the Reports and Recommendations because the Reports and Recommendations are unclear and do not provide a sufficient factual background. Accordingly, we DO NOT ACCEPT the Reports and Recommendations and REMAND the case to the Magistrate Judge so that the Magistrate Judge can provide supplemental Reports and Recommendations which more clearly set forth the facts and the reasons for dismissing the claims. The Court recommends that the Magistrate Judge deal with all the motions in one Report so that the interrelationship among the Defendants and facts allegedly supporting the various claims will be more clear.

SO ORDERED.

Dated: 4/2/98

/s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

## APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed March 4, 1998]
[Document 38]

No. C-1-96-983

| | |
|---|---|
| EVANS KOUKIOS | ) |
| | ) |
| Plaintiff, | ) |
| v. | ) |
| | ) |
| MICHAEL GANSON, et al., | ) |
| | ) |
| Defendants. | ) |

(Spiegel, J.; Hogan, M.J.)

ORDER

This matter is before the Court on pro se plaintiff Evans Koukios's motion to supplement the complaint. (Doc. 37). Plaintiff seeks an order pursuant to Fed. R. Civ. P. 15(d) permitting him to supplement his complaint.

On November 17, 1997, this Court issued a report recommending to the District Court that plaintiff's motion to amend the complaint be denied and that defendant' motion to dismiss be granted. (*See*

Doc. 33). Indeed, this Ocurt[sic] has recommended that all plaintiff's claim be dismissed. (*See* Docs. 25, 26). Plaintiff now seeks leave to supplement his complaint to assert a sixth claim for relief based on the RICO statute.

The granting or denial of a motion to file a supplemental pleading pursuant to Fed. R. Civ.P. 15(d) is within the discretion of the trial court. Upon the motion of a party, the Court may permit him to serve a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. The purpose of a supplemental pleading is to set forth new facts occurring since the filing of the original pleading and that affect the controversy and the relief sought; its function is to bring the action "up to date." Fed. R. Civ. P. 15(d). Such pleadings enable a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay, and waste of separate actions. Plaintiff's motion will be denied for two reasons. First, this Court has already recommended that plaintiff's complaint be dismissed with prejudice. (See Docs. 25, 26, 33). Second, despite plaintiff's assertions to the contrary, plaintiff's twenty seven page, two hundred and fifty-five paragraph "supplemental complaint" fails to set forth new facts that affect the present controversy. Rather, plaintiff asserts the same claims that have already been addressed by this Court. His allegations concerning various state court judges and contempt charges brought against him do not suggest that the Court should exercise its discretion to permit supplementation of the complaint. Nor has plaintiff demonstrated that these allegations relate to the

original complaint in any way. For the foregoing reasons, plaintiff's motion (Doc. 37) is hereby denied.

So Ordered.

Date: March 3, 1998

/s/Timothy S. Hogan
Timothy S. Hogan
United States Magistrate Judge

lww/TSH

## APPENDIX H

United States District Court
Southern District of Ohio
Western Division

[Filed February 4, 1997]
[Document 16]

No. C-1-96-983

| | |
|---|---|
| Evans Koukios | ) |
| | ) |
| Plaintiff | ) |
| vs. | ) |
| | ) |
| Michael Ganson, LPA, et al., | ) |
| | ) |
| Defendant | ) |

(J. Spiegel.)

ORDER

The undersigned hereby RECUSES himself from this case and TRANSFERS it to the docket of Magistrate Judge Timothy S. Hogan.

Date: 1/31/97
/s/Jack Sherman, Jr.
Jack Sherman, Jr.
United States Magistrate Judge